

## §9.3

## 12 CFR Ch. I (1–14 Edition)

### §9.3 Approval requirements.

(a) A national bank may not exercise fiduciary powers unless it obtains prior approval from the OCC to the extent required under 12 CFR 5.26.

(b) A national bank that has obtained the OCC's approval to exercise fiduciary powers is not required to obtain the OCC's prior approval to engage in any of the activities specified in §9.7(d) in a new state or to conduct, in a new state, activities that are ancillary to its fiduciary business. Instead, the national bank must follow the notice procedures prescribed by 12 CFR 5.26(e).

(c) A person seeking approval to organize a special-purpose national bank limited to fiduciary powers shall file an application with the OCC pursuant to 12 CFR 5.20.

[61 FR 68554, Dec. 30, 1996, as amended at 66 FR 34798, July 2, 2001]

### §9.4 Administration of fiduciary powers.

(a) *Responsibilities of the board of directors.* A national bank's fiduciary activities shall be managed by or under the direction of its board of directors. In discharging its responsibilities, the board may assign any function related to the exercise of fiduciary powers to any director, officer, employee, or committee thereof.

(b) *Use of other personnel.* The national bank may use any qualified personnel and facilities of the bank or its affiliates to perform services related to the exercise of its fiduciary powers, and any department of the bank or its affiliates may use fiduciary officers, employees, and facilities to perform services unrelated to the exercise of fiduciary powers, to the extent not prohibited by applicable law.

(c) *Agency agreements.* Pursuant to a written agreement, a national bank exercising fiduciary powers may perform services related to the exercise of fiduciary powers for another bank or other entity, and may purchase services related to the exercise of fiduciary powers from another bank or other entity.

(d) *Bond requirement.* A national bank shall ensure that all fiduciary officers and employees are adequately bonded.

### §9.5 Policies and procedures.

A national bank exercising fiduciary powers shall adopt and follow written policies and procedures adequate to maintain its fiduciary activities in compliance with applicable law. Among other relevant matters, the policies and procedures should address, where appropriate, the bank's:

(a) Brokerage placement practices;

(b) Methods for ensuring that fiduciary officers and employees do not use material inside information in connection with any decision or recommendation to purchase or sell any security;

(c) Methods for preventing self-dealing and conflicts of interest;

(d) Selection and retention of legal counsel who is readily available to advise the bank and its fiduciary officers and employees on fiduciary matters; and

(e) Investment of funds held as fiduciary, including short-term investments and the treatment of fiduciary funds awaiting investment or distribution.

### §9.6 Review of fiduciary accounts.

(a) *Pre-acceptance review.* Before accepting a fiduciary account, a national bank shall review the prospective account to determine whether it can properly administer the account.

(b) *Initial post-acceptance review.* Upon the acceptance of a fiduciary account for which a national bank has investment discretion, the bank shall conduct a prompt review of all assets of the account to evaluate whether they are appropriate for the account.

(c) *Annual review.* At least once during every calendar year, a bank shall conduct a review of all assets of each fiduciary account for which the bank has investment discretion to evaluate whether they are appropriate, individually and collectively, for the account.

### §9.7 Multi-state fiduciary operations.

(a) *Acting in a fiduciary capacity in more than one state.* Pursuant to 12 U.S.C. 92a and this section, a national bank may act in a fiduciary capacity in any state. If a national bank acts, or proposes to act, in a fiduciary capacity in a particular state, the bank may act in the following specific capacities:

(1) Any of the eight fiduciary capacities expressly listed in 12 U.S.C. 92a(a), unless the state prohibits its own state banks, trust companies, and other corporations that compete with national banks in that state from acting in that capacity; and

(2) Any other fiduciary capacity the state permits for its own state banks, trust companies, or other corporations that compete with national banks in that state.

(b) *Serving customers in other states.* While acting in a fiduciary capacity in one state, a national bank may market its fiduciary services to, and act as fiduciary for, customers located in any state, and it may act as fiduciary for relationships that include property located in other states. The bank may use a trust representative office for this purpose.

(c) *Offices in more than one state.* A national bank with fiduciary powers may establish trust offices or trust representative offices in any state.

(d) *Determination of the state referred to in 12 U.S.C. 92a.* For each fiduciary relationship, the state referred to in section 92a is the state in which the bank acts in a fiduciary capacity for that relationship. A national bank acts in a fiduciary capacity in the state in which it accepts the fiduciary appointment, executes the documents that create the fiduciary relationship, and makes discretionary decisions regarding the investment or distribution of fiduciary assets. If these activities take place in more than one state, then the state in which the bank acts in a fiduciary capacity for section 92a purposes is the state that the bank designates from among those states.

(e) *Application of state law—(1) State laws used in section 92a.* The state laws that apply to a national bank's fiduciary activities by virtue of 12 U.S.C. 92a are the laws of the state in which the bank acts in a fiduciary capacity.

(2) *Other state laws.* Except for the state laws made applicable to national banks by virtue of 12 U.S.C. 92a, state laws limiting or establishing preconditions on the exercise of fiduciary powers are not applicable to national banks.

[66 FR 34798, July 2, 2001]

## § 9.8 Recordkeeping.

(a) *Documentation of accounts.* A national bank shall adequately document the establishment and termination of each fiduciary account and shall maintain adequate records for all fiduciary accounts.

(b) *Retention of records.* A national bank shall retain records described in paragraph (a) of this section for a period of three years from the later of the termination of the account or the termination of any litigation relating to the account.

(c) *Separation of records.* A national bank shall ensure that records described in paragraph (a) of this section are separate and distinct from other records of the bank.

## § 9.9 Audit of fiduciary activities.

(a) *Annual audit.* At least once during each calendar year, a national bank shall arrange for a suitable audit (by internal or external auditors) of all significant fiduciary activities, under the direction of its fiduciary audit committee, unless the bank adopts a continuous audit system in accordance with paragraph (b) of this section. The bank shall note the results of the audit (including significant actions taken as a result of the audit) in the minutes of the board of directors.

(b) *Continuous audit.* In lieu of performing annual audits under paragraph (a) of this section, a national bank may adopt a continuous audit system under which the bank arranges for a discrete audit (by internal or external auditors) of each significant fiduciary activity (*i.e.*, on an activity-by-activity basis), under the direction of its fiduciary audit committee, at an interval commensurate with the nature and risk of that activity. Thus, certain fiduciary activities may receive audits at intervals greater or less than one year, as appropriate. A bank that adopts a continuous audit system shall note the results of all discrete audits performed since the last audit report (including significant actions taken as a result of the audits) in the minutes of the board of directors at least once during each calendar year.

(c) *Fiduciary audit committee.* A national bank's fiduciary audit committee must consist of a committee of